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SPECIAL COMMITTEE ON THE CHARTER OF
THE UNITED NATIONS AND ON THE
STRENGTHENING OF THE ROLE OF THE
ORGANIZATION
1-19 March 1993

Note by the Secretariat

The present document, which was transmitted to the Secretary-General by a letter dated 29 January 1993 from the Permanent Mission of Guatemala to the United Nations, is a revised version of the proposal (A/45/742) made by the delegation of Guatemala to the General Assembly at its forty-fifth session. It is being submitted to the Special Committee pursuant to paragraph 182 of the report of the Committee on its 1992 session (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 33 (A/47/33)), which took note of the offer of the delegation of Guatemala to prepare, for the consideration of the Committee at its 1993 session, a revised draft of the proposal set out in paragraph 132 of the said report, taking into consideration the comments made on the various articles of the proposal, as summarized in paragraphs 136-181 of the report.

Annex

[Original: Spanish]

EXPLANATORY MEMORANDUM CONCERNING THE NEW VERSION OF THE DRAFT CONCILIATION RULES SUBMITTED BY GUATEMALA

1. Guatemala has the honour to submit, in the annex to this document, a revised version of the United Nations rules for the conciliation of disputes between States which the Special Committee considered at its 1992 session. This new version takes into account the comments made in the Special Committee at that session; Guatemala is thus following up the offer which it made during that session to "submit, at a later stage, by the next session of the Special Committee at the latest, a revised draft of its proposal". 1/

2. Members of the Special Committee, in making general comments on the draft rules in 1992, expressed doubts as to "whether it was necessary to have one set of rules for a sole conciliator and another set of rules for a conciliation commission, as suggested in the above proposal". 2/

3. In introducing the draft rules in the Sixth Committee of the General Assembly on 17 October 1990, the representative of Guatemala noted that conciliation by a sole conciliator, as provided for in the rules, "was nearly identical to mediation except that it was carried out exclusively by individuals". 3/

4. Mediation and conciliation do not differ in essence, the aim of both being to provide States parties to a dispute with settlement modalities recommended by a third party or third parties, which are not binding.

5. There are, however, traditional and very pronounced differences between the two types of proceedings with regard to non-essential aspects.

6. Except in cases where conciliation is carried out by an organ of an international organization, in relations between States conciliation is invariably carried out by individuals, who make up a commission. Such a commission consists of five or, in exceptional cases, three individuals. Furthermore, while conciliation by such commissions is less formal than that by the International Court of Justice, other international courts and arbitral bodies, it none the less has much in common with judicial or arbitral proceedings. For this reason, conciliation has a semijudicial nature.

7. Mediation, on the other hand, is usually carried out solely by a mediator, which can be an individual as well as a Government or an international organization. In addition, unlike conciliation, mediation is characterized by flexibility and a near-total absence of formal rules. (See, e.g., article XII of the Pact of Bogotá.) For this reason, like international courts and judicial bodies, conciliation commissions have a seat and a secretariat, while the parties have representatives. A mediator, on the other

hand, usually has neither a seat nor a secretariat, and the parties' representation before the mediator is not subject to any given formalities.

8. The foregoing explains the difference which existed, in Guatemala's original draft rules, between conciliation by a commission and conciliation by a sole conciliator.

9. In preparing the draft submitted herewith, however, it seemed to us that, in view of the near-total lack of formality by which mediation is characterized, and taking into account relevant international practice, which is so firmly entrenched, it was preferable to omit from the rules the anomalous figure of the sole conciliator, which we had introduced, and to follow the very traditional guidelines and terminology provided by the conciliation rules of the Institute of International Law and the numerous treaties which refer solely to conciliation as a method for the settlement of disputes between States parties, or which envisage conciliation together with other settlement modalities.

10. Another innovation in the original draft proposal was the possibility provided for therein that the conciliation commissions, the establishment and activities of which were governed by the rules, would deal with disputes bearing solely on facts. In such cases, the role of the commissions would more properly be to investigate, rather than to conciliate.

11. It has now become clear to us that this was overly ambitious. Accordingly, the draft submitted herewith envisages only commissions which, while authorized, as is normal, to investigate issues of fact on which there is disagreement between the parties, will not, under any circumstances, be devoted solely to the investigation of questions of fact (as the investigation and conciliation commissions provided for in article XXVI of the Pact of Bogotá can be).

12. Another general comment made in 1992 by members of the Special Committee had to do with "whether the aim should be to produce detailed rules applicable to any conciliation or to establish a set of flexible model rules which States might use or adapt as appropriate". 4/

13. We found this comment surprising. Various provisions of the original draft make it clear that the rules can be amended by the parties, by mutual agreement, without any restriction whatsoever. Needless to say, any State may adopt conciliation agreements that are entirely different from the rules. In other words, the rules offer a comprehensive model in that they cover all aspects of conciliation, yet they are infinitely flexible. In this regard the term "rules" used in the title should not cause confusion: the model set of rules adopted by the United Nations Commission on International Trade Law (UNCITRAL) is also entitled "Conciliation Rules" even though they are, like our rules, infinitely flexible, in the sense that they in no way claim to be binding on the parties. Similarly, the rules being proposed by Guatemala may, for States interested in settling by conciliation a dispute that has arisen between them, serve simply as a basis for discussion about concluding an agreement to that end.

14. In both their original and revised versions, the draft rules submitted by Guatemala are based in large part on the conciliation rules referred to earlier that were adopted in 1961 by the Institute of International Law, the text of which can be found on pages 374-380 (French) and 385-391 (English) of volume 49 (Part II) of the Institute's Annuaire for that year. 5/

15. Unlike our draft text, the Institute's rules, in whose preparation eminent experts in international law took part, contain only some of the body of provisions required for conciliation proceedings. The rules that they do include govern primarily the proceedings of a conciliation commission, the conclusion of its work and the confidential nature of that work. It should be noted that the rules on that latter point are a complete innovation, since existing agreements made no provision for the confidentiality of a conciliation body's work. Yet this is a point that in our view is fundamentally important. Indeed, if the confidential nature of the conciliation commission's work is not guaranteed, States will hesitate to use conciliation to settle their disputes, and such a lacuna can also jeopardize the success of conciliation proceedings already under way. Consequently, it is most fitting that the work done on this by the Institute, as innovative as it is valuable, should be drawn upon. We kept clearly in mind the appropriateness of doing so when elaborating our draft rules, both in the original version and in the version we now have the honour to submit.

16. The rules elaborated by Guatemala are also based on the UNCITRAL Conciliation Rules referred to, the European Convention of 1957 for the Settlement of Disputes, and the General Act of 1928 for the pacific settlement of international disputes, revised by the United Nations General Assembly on 28 April 1949.

17. Although our conciliation rules are thus eclectic, they are not confined to merely reproducing rules culled from other sources. We have actually introduced rather considerable changes in the rules drawn from other instruments. In addition, the draft we are now submitting, like the previous version, also contains totally novel provisions.

18. In article 2, paragraph 3, article 11, paragraph 2, and articles 19 and 23, the draft rules in the annex below link the Secretary-General of the United Nations to the conciliation proceedings. This is in line with paragraph 20 of the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field (General Assembly resolution 43/51 of 5 December 1988, annex).

19. Let us move on to an analysis of the various provisions of the new Guatemalan draft text. Except in the case of a few minor, purely stylistic changes, comments will be made on all the changes to the original draft.

20. It should be noted that we have deleted the explanatory commentary that was given in annex II to the General Assembly draft resolution 6/ containing the original draft text submitted by Guatemala (which can be found in

paragraph 5 of document A/45/742, issued on 20 November 1990). The operative part of the draft resolution has been amended accordingly.

Article 1

21. Paragraph 1 of this article, which corresponds to original draft article 1, has been amended because the original version was needlessly complex. Paragraph 2 of this article has been amended to avoid any duplication with the provisions of paragraph 1 of the following article.

Article 2

22. Paragraph 1 of this article, which corresponds to original draft article 2, provides that the State initiating the proceedings shall indicate the place it proposes as the seat of the commission and shall also propose what should in principle be the maximum duration of the conciliation process. The last point is necessary because article 24, which corresponds to original draft article 31, leaves unspecified the maximum duration of the conciliation process. It is now incumbent upon the State initiating the proceedings to indicate where the commission's seat is to be because, unlike the previous text (see original draft article 27, paragraph 1), the rules now being submitted make no provision to that effect. It should also be noted that paragraph 2 of original draft article 2 has been deleted, thus taking account of the opinion given by the Legal Counsel on the matter; 7/ and that in paragraph 3 of article 2, which corresponds to paragraph 4 of the original version, a second sentence has been added that is self-explanatory and seems to us very useful.

Article 3

23. This article is, mutatis mutandis, identical to original draft article 4.

Articles 4 and 5

24. These articles correspond to original draft articles 7 and 8. They are based partly on articles 6 and 7 of the European Convention. The requirement in the original draft that a conciliator not have resided in the territory of either party has been deleted.

Article 6

25. This article, which corresponds to the second sentence of original draft article 9, is based on article 8 of the European Convention.

Articles 7 and 8

26. These articles correspond to original draft articles 17 and 18. Article 7 is based in part on article 1 of the rules of the Institute of International Law and also on article 7, paragraph 1, of the UNCITRAL rules. Article 8 is based on article 7, paragraph 2, of the UNCITRAL rules. Most of

the suggestions made in paragraph 151 of the report of the Special Committee do not seem appropriate to us. It is very doubtful that there are any principles of international law that apply to conciliation, an institution that is purely and simply a matter of agreement and that the parties may shape as they see fit in each specific instance. The only disadvantage to this is that the parties cannot rely on customary law for assistance in filling in the gaps in the agreement in question, and this is precisely why the United Nations should adopt a model set of conciliation rules based on our draft. Furthermore, because of the basic purpose of any conciliation process, we believe the rules should provide that the commission must do everything possible to propose terms of settlement in cases where no agreement was reached in the course of the proceedings. Moreover, articles 7 and 8 should be kept separate, since they deal with different questions: article 7 sets out the commission's objectives and states how it must act, while article 8 specifies the principles and substantive considerations by which the commission must be guided. In the first sentence of article 7, immediately after the words "amicable settlement", the words "of the dispute" have been added, thus taking account of one of the suggestions made in paragraph 151 of the report of the Special Committee.

Article 9

27. We do not see the point of the suggestions made in paragraph 153 of the report of the Special Committee regarding original draft article 19, to which new draft article 9 corresponds. It must be borne in mind that the parties may, under articles 1 and 2 of the text, amend its provisions not only before initiating the proceedings but also at any later point. Furthermore, it seems to us that determining the basic rules that must govern the conciliation body must necessarily be one of the basic purposes of the prior agreement to be reached by the parties. These considerations are in line with the comments made by Mr. Henri Rolin, Rapporteur of the Institute of International Law for the topic of conciliation, at a meeting held by the Institute on 8 September 1961 to discuss the procedural difficulties encountered by conciliators, difficulties that our rules seek to eliminate. 8/ It also seems to us advisable, in order to save time, not to oblige the conciliation commission to agree on the basic principles on which it will proceed before beginning to deal with matters of substance, since that can involve considerable loss of time. The commission might not reach unanimous agreement on such principles and, in any case, those it adopted might not be to the liking of both parties. This could create tension from the start, something to be avoided at all costs.

Article 10

28. This article corresponds to original draft articles 20 and 21. Paragraph 1 no longer refers to "the place", by which was meant not the Commission's seat, already determined by the parties, but the premises to be used for the meeting. This is too insignificant a point to be dealt with in the rules, especially since it is covered by paragraph 3 of this article.

Article 11

29. This article, essentially but not exclusively based on article 4 of the Institute's rules, corresponds to original draft article 22. It incorporates self-explanatory amendments. The aspect of contestation, which according to paragraph 3 of this article is a necessary part of the conciliation proceedings, is in line with the relevant norm established in article 11, paragraph 1, of the General Act and in article 12, paragraph 1, of the European Convention. In our draft, however, this basic rule is subject to the exception stipulated in the second sentence of new draft article 20, paragraph 1, which corresponds to the second sentence of article 7, paragraph 1, of the Institute's rules. Thus, without being too rigid, our rules take into account the audi alteram partem rule, which is an elementary principle of justice.

Article 12

30. This article, which corresponds to original draft article 23, differs from it in some respects. In paragraph 1, a reference to "good faith" has been added, to match the corresponding reference in new draft article 25. A new paragraph has been added (paragraph 2), consisting of two sentences that are self-explanatory; however, it should be pointed out that the first sentence corresponds to article 11, paragraph 3, of the General Act, and that the main point of the second sentence is to allow the commission, if it sees fit, to communicate to the other party, without revealing their source, any comments it may have received under new draft article 15. Paragraph 3 amends paragraph 2 of original draft article 23 to make it clear that it is sufficient for only one of the parties to request that evidence be collected for the commission to be obliged to do so. Paragraph 3 allows the commission to ask the party making the request to reconsider it in view of the desirability of avoiding problems of the kind that in 1958 caused the breakdown of conciliation proceedings between France and Morocco. Lastly, it should be noted that, in new paragraph 4, the reference made in original draft article 23, paragraph 3, to The Hague Convention for the Pacific Settlement of International Disputes has been dropped, since it seems unnecessary to us.

Article 13

31. This article, which corresponds to original draft article 24, is based on article 5 of the Institute's rules, allowing the conciliation commission to collect evidence motu proprio. We do not agree with the comments on original draft article 24 made in paragraph 158 of the report of the Special Committee.

Article 14

32. We consider that this article, which corresponds to original draft article 25, does not deal with a question of detail but is, on the contrary, important enough to merit retention (see paragraph 159 of the report of the Special Committee). If the subject of the dispute is a technical one (for example, the delimitation of a maritime frontier), it would seem best for the

conciliators to be experts on the subject. Yet quite possibly no expert on the subject would be acceptable as a conciliator, since the parties would probably want to entrust such functions to eminent international figures, who is all likelihood would lack such expertise. Furthermore, it would not be appropriate for one or a few of the conciliators but not all of them to have technical knowledge, because in that case the conciliators would not all be on an equal footing. In addition, nothing would prevent the parties from agreeing from the start of the conciliation process that one or more expert advisors should assist the conciliators.

Article 15

33. This article corresponds to original draft article 38, which has been amended slightly, and it is an adaptation of article 10 of the UNCITRAL rules. Article 15 has no precedent in the field of conciliation between States. It is based on the following reasoning: even if no such provision existed, any comment made by one party would have to be communicated to the other in all cases (except after the conclusion of consideration of the matter, where the second sentence of new article 20, paragraph 1, applies). Such a comment, however, precisely because it is known to have come from one of the parties, may very well create animosity between them, especially if it constitutes a criticism - possibly in sarcastic or otherwise offensive terms - of an argument put forward by the other party. If, instead of being submitted in the usual way - which means that the other party would, as we have said, know the exact terms in which it was framed and be aware that it came from its opponent - the comment is submitted to the commission under article 15, the commission may then, if it considers the comment well-founded, use its authority under article 12, paragraph 2, and communicate it to the other party as if the commission itself had thought of it, naturally not presenting it in a way that might offend the party for which it was intended, but rather with all due tact. The comment will thus be kept from arousing animosity, resentment or ill-will between the parties. However, in order not to infringe the audi alteram partem principle, paragraph 2 of article 15 provides that comments submitted in accordance with that article shall not have evidentiary effect.

Article 16

34. This article corresponds to original draft article 40, and the second sentence contains a self-explanatory amendment. We believe that the rule set out in this article is not obvious. Because of this and because of its usefulness, the article should in our view be retained.

Article 17

35. The amendment incorporated in this article, which corresponds to original draft article 42, reflects the idea suggested in the last sentence of paragraph 174 of the report of the Special Committee, in that original draft article 41 has been deleted.

Article 18

36. This article, which corresponds to original draft article 26, has been retained with a few slight amendments, since we consider it essential. It should be noted that it conforms to article 6 of the Institute's rules, article 12 of the General Act and (in particular) article 13 of the European Convention. It should be further noted that, lacking this (or some other) rule applicable from the outset regarding the number of favourable votes required for a decision to be valid, the commission will find itself caught in a vicious circle from the start if it cannot decide, unanimously, whether or not its decisions must be taken unanimously.

Article 19

37. Paragraph 1 of the original version of this article, namely, original draft article 27, has been deleted. The reference for this article is article 9, paragraph 2, of the General Act.

Article 20

38. This article corresponds to original draft articles 28 and 29, combined into a single article. Paragraph 3 of original draft article 28 was deleted once the option of the commission as an exclusively investigatory body was set aside. For the same reason, some words were deleted from the first sentence of paragraph 1 of original draft article 28. Some other amendments have been made to the original provisions that are more a matter of style or nuance. The text of new draft article 20 of the rules is, like former articles 28 and 29, based on articles 7 and 8 of the Institute's rules, which in our view are very appropriate and useful, and do not merit the criticisms directed against them in paragraph 162 of the report of the Special Committee.

Article 21

39. This article, which corresponds to original draft article 48, article XXVIII of the Pact of Bogotá and paragraph 6 of the Annex to the Vienna Convention on the Law of Treaties, has been retained, largely because of the utility of its last two sentences. It incorporates some minor amendments to the original text.

Articles 22 and 24

40. These two articles, which correspond to original draft articles 30 and 31, incorporate amendments made to take into account the comments contained in paragraphs 163 and 164 of the report of the Special Committee. At the end of paragraph 2 of article 22 there is a self-explanatory amendment. The maximum duration of the conciliation proceedings has been left unspecified, the parties having to reach specific agreement on this point (see article 2, paragraph 1, and paragraph 22 above). Article 24 incorporates other self-explanatory amendments.

Article 23

41. This article, which corresponds to original draft article 36, is based on article 14 of the Institute's rules. In our view the documents should not remain in the possession of the parties, since any indiscretion by either party could create tension between them, a risk which is minimized if the documents are in the possession of an impartial third party. Further, this third party should ideally be the Secretary-General of the United Nations.

Article 25

42. We do not share the view expressed by some members of the Special Committee that this article, which corresponds to original draft article 45, is unnecessary and unrealistic. 9/ Consider the case where in one of the States parties to the dispute which is the subject of conciliation there occurs a change of Government during the conciliation proceedings and the new authorities, unlike their predecessors, do not wish the proceedings to reach a conclusion, and they therefore systematically obstruct them. We thus consider it appropriate to retain this article, in which we have made an amendment that takes account of another comment made during the work of the Special Committee and another amendment which consists in deleting the words "impeding those proceedings or violating provisions of these rules", conduct which is incompatible with good faith.

Articles 26, 27 and 28

43. These articles, which correspond to original draft articles 32 to 35, are based on articles 10 to 14 of the Institute's rules, all being part of the section on the secrecy of the work of the conciliation commission, a question whose importance has been stressed in paragraph 15 above. Articles 26, 27 and 28 nevertheless incorporate considerable changes with regard to the respective original draft articles, which are too dense, and the four articles cited from the Institute's rules. It should be noted that article 26, paragraph 2, corresponds to the second paragraph of article 10 of the Institute's rules, which was adopted by the Institute on the proposal of Sir Humphrey Waldock. In accordance with article 28, paragraph 1, the certified copies referred to in article 27, paragraph 2, are not subject to the obligation to respect the secrecy of the proceedings, which continues beyond the conclusion of the proceedings, in view of the usefulness of allowing any evidence that emerges during the conciliation proceedings to be submitted, by any party wishing to make use of such evidence, in any subsequent judicial or arbitral process concerning the dispute which was the subject of the conciliation proceedings. (See the first sentence of original draft article 35, which corresponds to the first sentence of article 13 of the Institute's rules.) Since the terms of settlement accepted by the parties are regarded as constituting an agreement under Article 102 of the Charter of the United Nations, in the case of such terms the obligation to maintain the secrecy of the proceedings has been removed.

Article 29

44. This article, which corresponds to original draft articles 43 and 44, has been amended to take account of some of the comments made during the work of the Special Committee, 10/ as well as the period provided for in article 20, paragraph 2.

Article 30

45. This article, which corresponds to original draft article 37, is based on the eighth preambular paragraph of the Institute's rules, which in turn originated in the proposals of Wilfred Jenks and Sir Gerald Fitzmaurice. This rule, the importance of which was stressed in the work of the Institute, reflects the idea so felicitously expressed by the illustrious Max Huber in his remark that "la conciliation permet de céder tout en laissant entière la question de principe". It should be noted, with regard to article 30, that its terms are mutatis mutandis those of article 35 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, a provision whose formulation we consider more appropriate than that of original draft article 37.

Article 31

46. This article corresponds to article 47 of the original draft, article 46 of which has been deleted. It also corresponds to article 15 of the Institute's rules.

47. Lastly, it should be noted that original draft articles 3 (corresponding to article 31, paragraph 5, of the Statute of the International Court of Justice and article XXI of the Pact of Bogotá), 5, 6, 10 to 16, 41 and 46 have been completely deleted.

Notes

1/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 33 (A/47/33), para. 182.

2/ Ibid., para. 135.

3/ A/C.5/45/SR.17, para. 43.

4/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 33 (A/47/33), para. 135.

5/ Annuaire de l'Institut de Droit International, vol. 49, Part II (1961), pp. 374-380 and 385-391.

6/ A/C.6/45/L.2.

Notes (continued)

7/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 33 (A/47/33), para. 137.

8/ See Annuaire de l'Institut de Droit International, vol. 49, Part II (1961), p. 217.

9/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 33 (A/47/33), para. 177.

10/ Ibid., paras. 175 and 176.

Appendix

UNITED NATIONS RULES FOR THE CONCILIATION OF DISPUTES BETWEEN STATES

The General Assembly,

Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of relations between States,

Convinced that the establishment of international rules of conciliation incorporating the results of the most recent scientific studies and experience in the field of international conciliation, together with certain innovations which should be made in the traditional practice in this field, could contribute to the development of harmonious relations between States,

1. Recommends the application of the United Nations Rules for the Conciliation of Disputes between States, the text of which is contained in the annex to the present resolution, in any case where a dispute arises between States which it has not been possible to settle by direct negotiations and which the parties wish to settle by purely amicable means;

2. Requests the Secretary-General to take appropriate measures to circulate to all Governments the text of the present resolution, together with those rules.

Annex

UNITED NATIONS RULES FOR THE CONCILIATION OF DISPUTES BETWEEN STATES

CHAPTER I

APPLICATION OF THE RULES

Article 1

1. These rules apply to the conciliation of disputes between States which it has not been possible to settle through the diplomatic channel.

2. The States applying these rules may at any time agree to exclude or amend any of their provisions.

CHAPTER II

INITIATION OF THE CONCILIATION PROCEEDINGS

Article 2

1. The State which initiates conciliation proceedings in accordance with these rules shall send the other State a written invitation to conduct a process of conciliation in accordance with these rules, identifying and defining the subject of the dispute. In the invitation, the State initiating the conciliation proceedings shall indicate the amendments it proposes to the rules, if any, its choice as regards the number of conciliators, the place it proposes as the seat of the commission referred to in article 3 below and the maximum duration of the Commission's work, as stipulated in article 24.

2. The conciliation proceedings shall begin as soon as possible after the State to which the invitation has been sent has accepted it or, if it is not accepted, after the States have agreed to apply an amended version of these rules.

3. If the States cannot reach agreement on the definition of the dispute, they may jointly request the assistance of the Secretary-General of the United Nations to resolve the difficulty. They may also request his assistance to resolve any other difficulty they may have in reaching an agreement on the terms of the conciliation proceedings.

CHAPTER III

NUMBER OF CONCILIATORS

Article 3

There may be three conciliators or five conciliators. In either case the conciliators shall form a commission.

CHAPTER IV

APPOINTMENT OF CONCILIATORS

Article 4

If the parties have agreed that three conciliators shall be appointed, each one of them shall appoint a conciliator who may be of its own nationality. The parties shall appoint by mutual agreement the third conciliator, who may not be of the nationality of any of the parties or of the other conciliators. The third conciliator shall act as chairman of the commission. If he is not appointed within two months of the appointment of the conciliators appointed individually by the parties, the third conciliator shall be appointed by the Government of a third State chosen by agreement between the parties or, if such agreement is not obtained within two months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next judge of the Court in order of seniority who is not a national of the parties. The third conciliator shall not reside habitually in the territory of the parties or be or have been in their service.

Article 5

1. If the parties have agreed that five conciliators should be appointed, each one of them shall appoint a conciliator who may be of its own nationality. The other three conciliators, one of whom shall be chosen with a view to his acting as chairman, shall be appointed by agreement between the parties from among nationals of third States and shall be of different nationalities. None of them shall reside habitually in the territory of the parties or be or have been in their service. None of them shall have the same nationality as that of the other two conciliators.

2. If the appointment of the conciliators whom the parties are to appoint jointly has not been effected within three months, they shall be appointed by the Government of a third State chosen by agreement between the parties or, if such an agreement is not reached within three months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment shall be made by the Vice-President or the next judge in order of seniority who is not a national of the parties. The Government or

member of the International Court of Justice making the appointment shall also decide which of the three conciliators shall act as chairman.

3. If at the end of the three-month period referred to in the preceding paragraph, the parties have been able to appoint only one or two conciliators, the two conciliators or the conciliator still required shall be appointed in the manner described in the preceding paragraph. If the parties have not agreed that the conciliator or one of the two conciliators whom they have appointed shall act as chairman, the Government or member of the International Court of Justice appointing the two conciliators or the conciliator still required shall also decide which of the three conciliators shall act as chairman.

4. If, at the end of the three-month period referred to in paragraph 2 of this article the parties have appointed three conciliators but have not been able to agree which of them shall act as chairman, the chairman shall be chosen in the manner described in that paragraph.

Article 6

The vacancies which may occur in the commission as a result of death, resignation or any other cause shall be filled as soon as possible by the method established for appointing the members to be replaced.

CHAPTER V

FUNDAMENTAL PRINCIPLES

Article 7

The commission, acting independently and impartially, shall endeavour to assist the parties in reaching an amicable settlement of the dispute. To that end, it shall attempt to clarify the issues in dispute and to help the parties reach an agreement. It shall seek to obtain all information necessary or useful for the attainment of those objectives. If no settlement is reached during consideration of the dispute, the commission shall draw up and communicate to the parties, through a report of its chairman, such terms of settlement as it deems appropriate.

Article 8

The commission shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties and the facts and circumstances of the case.

CHAPTER VI

PROCEDURES AND POWERS OF THE COMMISSION

Article 9

While adhering to the procedural provisions of these rules, the commission shall adopt its own procedures.

Article 10

1. Before the commission begins its work, the parties shall designate the representatives and shall communicate the names of such representatives to the chairman of the commission. The chairman shall determine, in agreement with the parties, the date of the commission's first meeting, to which the members of the commission and the representatives shall be convoked.

2. The representatives of the parties may be assisted by counsel and experts appointed by the parties.

3. Before the first meeting of the commission, its members may meet informally to deal with administrative and procedural matters.

Article 11

1. At its first meeting, the commission shall appoint a secretary and shall then hear initial statements from the parties. If it decides that the information provided by the parties so permits, the commission shall agree on the method to be used to consider the dispute and, in particular, whether the parties should be invited to submit written statements and in what order and within what time-limits such statements must be submitted, as well as the dates when, if this is required, representatives and counsel will be heard. The decisions taken by the commission in this regard may be amended at any later stage of the proceedings.

2. The secretary of the commission shall not have the nationality of any of the parties, shall not reside habitually in their territory and shall not be or have been in the service of any of them. He may be a United Nations official if the parties so wish and if they agree with the Secretary-General of the Organization on the conditions under which that official will exercise his functions.

3. Subject to the provisions of article 20, paragraph 1, the commission shall not allow the representative or counsel of one party to attend a meeting without having also given the other party the opportunity to be represented at the same meeting.

Article 12

1. The parties, acting in good faith, shall facilitate the commission's work and, in particular, shall do everything possible to provide it with whatever documents and information may be relevant.

2. The commission may ask the parties for whatever explanations it deems necessary or useful. It may also make comments on the arguments submitted or the statements made by the parties.

3. The commission shall accept any request by a party that persons whose testimony it considers necessary or useful be heard, that experts be consulted or that local investigations be conducted. It may, however, in any case in which it considers it neither necessary nor useful to accept such a request, ask the party making the request to reconsider it.

4. The parties shall use the means available to them to enable the commission to enter their territory and, in accordance with their laws, to convoke and hear witnesses or experts and visit any part of their territory to conduct local investigations.

Article 13

If the commission ascertains that the parties disagree on issues of fact, it may, motu proprio, consult experts, conduct local investigations or question witnesses. It may also, with the consent of both parties, collect evidence to clarify facts which the parties have not taken into account. Article 12, paragraph 4, shall apply to any investigation made in accordance with this article.

Article 14

The commission may propose to the parties that they jointly appoint expert advisers to assist them in the consideration of technical aspects of the dispute. If the proposal is accepted, its implementation shall be conditional upon the expert advisers being appointed by the parties by mutual agreement and accepted by the commission and upon the parties fixing their emoluments.

Article 15

1. Any of the parties may provide the commission with written comments on situations or facts relating to the dispute and on arguments submitted by the other party, on the understanding that the origin of the comments shall not be revealed to the latter.

2. Comments submitted in accordance with this article shall not have any evidentiary effect if they affirm or refute facts.

Article 16

Each party may at any time, at its own initiative or at the initiative of the commission, make proposals for the settlement of the dispute. Any proposal made in accordance with this article shall be communicated immediately to the other party.

Article 17

At any stage of the proceedings, the commission may, at its own initiative or at the initiative of one of the parties, draw the attention of the parties to any measures which might be advisable or which might facilitate a settlement.

Article 18

The commission shall endeavour to take its decisions unanimously but, if unanimity proves impossible, it may take decisions by a majority of votes of its members. Except in matters of procedure, the presence of all members shall be required in order for a decision to be valid.

Article 19

The commission may, at any time, ask the Secretary-General of the United Nations for advice or assistance with regard to the administrative and procedural aspects of its work.

CHAPTER VII

CONCLUSION OF THE CONCILIATION PROCEEDINGS

Article 20

1. On concluding its consideration of the dispute, the commission shall, if full settlement has not been reached, define the terms of settlement which are likely to be acceptable to the parties. To that end, it may hold an exchange of views with the representatives of the parties, who may be heard jointly or separately.

2. The terms of settlement adopted by the commission shall be set forth in a report communicated by the chairman of the commission to the representatives of the parties, with a request that the representatives inform the commission, within a given period, whether the parties accept them. The chairman shall include in the report the reasons which, in the commission's view, might prompt the parties to accept the proposed terms of settlement. The commission shall endeavour not to present in its report any final conclusions with regard

to facts or to rule formally on issues of law, unless the parties have jointly asked it to do so.

3. If the parties accept the terms of settlement proposed by the commission, a document shall be drawn up setting forth the conditions of acceptance. The document shall be signed by the chairman and the secretary. A copy signed by the secretary shall be provided to each party, and this shall conclude the proceedings.

Article 21

The terms of settlement proposed shall be simply recommendations submitted to the parties for consideration in order to facilitate an amicable settlement of the dispute. The parties nevertheless undertake to study them carefully and objectively. If one of the parties rejects terms of settlement which the other party accepts, it shall inform the latter, in writing, of the reasons why it could not accept them.

Article 22

1. If the terms of settlement are not accepted by both parties and the latter do not wish further efforts to be made to reach agreement on different terms, a document signed by the chairman and the secretary of the commission shall be drawn up, omitting the proposed terms and indicating that the parties were unable to accept them and do not wish further efforts to be made to reach agreement on different terms. The proceedings shall be concluded when each party has received a copy of the document signed by the secretary.

2. If the terms of settlement are not accepted by both parties but the latter wish efforts to reach agreement on different terms to continue, the proceedings shall be resumed, and all the provisions used thus far in the proceedings shall apply, except that it shall not be necessary to appoint a new secretary. Article 24 shall apply to the resumed proceedings, with the relevant time-limit running from the commission's first meeting after resumption of the proceedings.

Article 23

Upon conclusion of the proceedings, the chairman of the commission shall deliver the documents in the possession of the secretariat of the commission to the Secretary-General of the United Nations who, subject to the possible application of article 28, paragraph 2, shall preserve their secrecy.

Article 24

Except where the parties or the commission with the consent of the parties grant an extension, the commission shall conclude its work within ..... from the date of its first meeting.

Article 25

If the commission finds one or both of the parties to be refraining from extending in good faith the cooperation necessary for the satisfactory progress of the conciliation proceedings, it may terminate the proceedings without proposing terms of settlement. If the commission makes use of this power, it shall communicate to the parties in writing, in a thorough and precise manner, the reasons why this step has been taken.

CHAPTER VIII

SECRECY OF THE COMMISSION'S WORK AND DOCUMENTS

Article 26

1. The commission's meetings shall be closed. Its members and expert advisers, the representatives and counsel of the parties, and the secretary and secretariat staff, shall refrain from divulging any documents or statements, or any communication concerning the progress of the proceedings, without the prior approval of both representatives.

2. If any indiscretion occurs during the proceedings, the commission may determine its possible effect on the continuation of such proceedings.

Article 27

1. Each party shall receive, through the secretary, certified copies of the minutes of the meetings at which it was represented.

2. Each party shall receive, through the secretary, certified copies of any documentary evidence received and of experts' reports, records of investigations and statements by witnesses.

Article 28

1. Except with regard to the certified copies referred to in article 27, paragraph 2, the obligation to respect the secrecy of the proceedings and of the deliberations shall remain in effect for the parties and for members of the commission, expert advisers and secretariat staff after the proceedings are concluded and shall extend to terms of settlement and proposals which were not accepted.

2. Notwithstanding the foregoing, the parties may, upon conclusion of the proceedings and by mutual agreement, make available to the public all or some of the documents or authorize the publication of all or some of them.

3. It is understood that the terms of settlement accepted by the parties are subject to the registration obligation laid down in Article 102 of the Charter of the United Nations.

CHAPTER IX

PROHIBITION OF ACTS WHICH MIGHT HAVE AN ADVERSE EFFECT ON THE CONCILIATION PROCEEDINGS

Article 29

1. Except where necessary for preserving its rights, neither of the parties shall initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of the dispute which is the subject of the conciliation proceedings.

2. The parties shall refrain from any measures which might have an adverse effect on the terms of settlement proposed by the commission, until those terms have been explicitly rejected by both or one of the parties and the period established in accordance with article 20, paragraph 2, has expired. The parties shall also, in general, refrain from any measure which might aggravate or exacerbate the dispute.

CHAPTER X

PRESERVATION OF THE LEGAL POSITION OF THE PARTIES

Article 30

Except as the parties shall otherwise agree, neither party shall be entitled in any other proceedings, whether in a court of law or before arbitrators or before any other body, entity or person, to invoke any views expressed or statements, admissions or proposals made by the other party in the conciliation proceedings, but not accepted or the report of the commission, the terms of settlement approved by the commission or any proposal made by the commission without the acceptance of both parties.

CHAPTER XI

COSTS

Article 31

The costs of the conciliation proceedings, including those occasioned by any investigations which the commission decided to conduct motu proprio and the emoluments of expert advisers appointed in accordance with article 14, shall be borne by the parties in equal shares.